The Broadcast Team, Inc.
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RE: CG Docket No. 02-278 Preemption

The Broadcast Team, Inc. is filing these comments in response to a request for comment disseminated by the Federal Communications Commission pursuant to 47 CFR §§ 1.415, 1.419. The Broadcast Team, Inc. is a service provider that can broadcast thousands of prerecorded messages to residences and businesses around the country. We have been in business since 1992 and we have always endeavored to comply with all laws applicable to our services. Our dialers are programmatically restricted from placing any intrastate call which is the heart of question to the FCC. Does the FCC have exclusive rulemaking authority and jurisdiction over interstate telephone calls and does that authority preempt state law?

On December 20, 1991, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243, which amended the Communications Act of 1934 by adding a new section, 47 U.S.C. § 227. The TCPA mandated that the Commission implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising. On September 17, 1992, the Commission adopted a *Report and Order* (CC Docket 92-90, FCC No. 92-443), which established rules governing unwanted telephone solicitations and regulated the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

In addition, New Jersey, as well as many other states, have enacted laws that are more restrictive than those contained in the TCPA. Specifically the New Jersey Rules are more restrictive in that they:

1. Do Not contain an Inquiry based Existing Business Relationship Exemption
2. Do Not Extend Existing Customer and Established Customer Exemptions to a Company's Affiliates
3. Fails to provide a personal relationship exemption
4. The transaction based exemption is substantially narrower and more restrictive than those in the TCPA

Furthermore, other states have enacted laws that are stricter or are clearly in contrast with the TCPA Rules as well and include:

Mississippi:	Calls must be placed between 8 a.m. and 8 p.m. Bans recorded message delivery to all but persons

	with whom the caller has an existing business relationship Requires telephone logs to be maintained for 6 months
Wisconsin:	Bans recorded messages outright unless consent is given by recipient Specifically claims jurisdiction by stating that their laws apply to interstate calls Has no exemption for non-profit organizations
Florida:	Prerecorded sales call made to recipient or when a prior or existing business relationship exists is still a violation of state law
Connecticut	Bans delivery of recorded messages outright
Colorado:	Contains an Inquiry based Existing Business Relationship Exemption limited to 30 days
Kentucky:	Limits calling times to 10 a.m. to 9 p.m. Has no exemption for non-profit organizations

This list is not exhaustive as the list of more restrictive provisions in state law is too expansive to list here. However, it is important to note that each and every state that has a more restrictive law grants itself jurisdiction over calls placed into the state from another state, defined as an interstate call. This is clearly contrary to 47 USC § 227 (e)(1) limiting state jurisdiction to only intrastate calls, or calls placed and terminated within a state.

Whether a state may impose requirements on interstate communications should include an analysis under the Supremacy Clause of Article VI of the U.S. Constitution. Under the Supremacy Clause, a state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation. The key inquiry is whether Congress intended to preempt state laws on the same subject. Section 2(a) of the Act grants the Commission jurisdiction over all interstate and foreign communications. Interstate communications are defined as communications or transmissions between points in different states. Section 2(b)(1) of the Act generally reserves to the states jurisdiction over intrastate communications. Intrastate communications are defined as communications or transmissions between points within a state.

The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the

use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. The TCPA also preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages. By its terms, the TCPA shall not "preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."

In light of the provisions described above, New Jersey can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes New Jersey and all other states from regulating or restricting interstate commercial telemarketing calls. Therefore, New Jersey and other states cannot apply its statutes to calls that are received in New Jersey and originate in another state or calls that originate in New Jersey and are received in another state.

The Rules note that although states may impose more stringent restrictions on intrastate telemarketing, state rules that purport to apply to interstate telemarketing that are inconsistent with and more restrictive than the Commission rules negate the federal objective of creating uniform national rules, impose heavy compliance costs for companies that use the telephone network to communicate to a national consumer database. The very reason for preemption is to create one uniform set of laws to facilitate compliance by small businesses.

The Broadcast Team has, and always will, endeavor to comply with applicable laws. We believe that, relative to our services as a provider of interstate calls, only Federal law applies. It is burdensome for small companies such as The Broadcast Team to comply with the myriad of state laws when there is no consistent theme to these laws. There are technical and administrative contradictions between the different state laws. For example, complying with different state laws would require that for each individual calling project performed by our organization there would need to be separate administrative and technical procedures used taking into consideration different call delivery times, different requirements for determining whether or not an existing business relationship exists, different definitions of “telemarketing” and “solicitation”, different requirements for inquiry based upon relationships and whether or not non-profit organizations are exempt from a particular state law.

The administrative costs to comply with all state laws would include additional personnel and staff resources dedicated to legal and technical compliance. Additionally there would be significant costs for obtaining and

maintaining all of the various state Do Not Call lists that would be required to be purchased. The cost to purchase all state Do Not Call lists in 2004 exceeded $20,000 (per year), and this expense is slated to double in 2005 (Wisconsin is proposing a fee of $20,000 for that state's list alone). State laws are not even consistent as to whether or not a particular Do Not Call list can be shared with other entities. The cost for complying with each state's laws would be daunting. The Federal scheme, on the other hand, is uniform and relatively clear for small businesses to comply with. There is one law, one scheme, one Do Not Call list and one organization, The Federal Communications Commission, to look to for guidance for complying with the law.

If the FCC does not rule that the TCPA preempts state law, the ramifications would be a continuing patchwork of rules and regulations for each state, forcing small businesses to either spend more and more resources on compliance with multiple conflicting state laws or face having to defend their belief in Federal preemption in court. Businesses such as ours will be required to wait until our judicial system decides in disputes over preemption. The Federal Appellate Courts have already had to decide on the issue because the FCC has so far failed to do so. *See* International Science Technology Institute, Inc., v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Chair King, Inc., v. Houston's Cellular Corp., et al. 131 F.3d 507, 513 (5th Cir. 1997). Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995). But see Van Bergen v. State of Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995) (state law application to intrastate calls using recordings is not preempted.)

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.,* 469 U. S. 189, 194 (1985). It is imperative that a plain reading of statutory language be used in this case. The law clearly states that the FCC has exclusive jurisdiction of interstate communications and limits the purview of state law to that of jurisdiction over calls originating and terminating in a single state. As such, the FCC should state firmly that it has exclusive jurisdiction and that state laws are preempted by the TCPA. Failure to decide this issue in the past has led the courts to intervene as shown above. Its time for the FCC to state in clear language that when dealing with interstate calls, the TCPA preempts state law.

Sincerely,

Robert J. Tuttle
CEO
The Broadcast Team, Inc.